RECEIVED
FEB 14 1977
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-6194

THE UNITED STATES OF AMERICA, Respondent

vs.

PETER RINALDI, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mark R. Baer

MARK R. BAER
Attorney at Law
Suite 400, Roberts Building
28 West Flagler Street
Miami, Florida 33130
Telephone No. (305) 377-1603

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	6
Statute Involved	6
Statement	7
Conclusion	10
Certificate of Service	10
Exhibits	11

CITATIONS

Cases

Abbate vs. United States 359 U.S. 187 (1959)	3
Ackerson vs. United States 419 U.S. 1099, 95 S.Ct. 769 (1975)	8
Bartkus vs. Illinois 359 U.S. 121 (1959)	3
Douglas Watts vs. The United States 422 U.S. 1032, 95 S.Ct. 2648, 45 L.Ed. 2d 688 (1975)	2, 4
United States vs. Ammidown 497 F.2d 615 (D.C. Cir., 1973)	5, 6
United States vs. Hayles 419 U.S. 892, 95 S.Ct. 168 (1974	8, 9

Statutes:

None

IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

THE UNITED STATES OF AMERICA, :

Respondent, :

vs. :

PETER RINALDI, :

Petitioner. :

_____:

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment and Opinion of The United States Court of Appeals for the Fifth Circuit entered in the above styled case on December 20, 1976, and which became final on January 19, 1977.

CITATION TO OPINION BELOW

The opinion of The United States Court of Appeals for the Fifth Circuit is to the best of the undersigned attorney's knowledge, not reported in bound volume at this time. However, a copy of said opinion is attached hereto and marked as Petitioner's Exhibit "B".*

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit was entered in its opinion filed on December 20, 1976. Rehearing was denied on January 19, 1977, and at that time the Judgment became final. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and the conflicting decision of the United States Court of

* Not filmed.

Appeals for the Fifth Circuit, with the decision rendered by this Honorable Court in the case of Douglas Watts vs. The United States, reported at 422 U.S. 1032, 95 S.Ct. 2648, 45 L.Ed. 2d 688 (1975). The Jurisdiction within said statute is based upon a claim violation of the doctrine of separation of powers as embodied within the Federal Constitution. This claim arises from the fact that the United States District Court for the Southern District of Florida, the trial court below, denied upon the granting of a Motion to remand this case, the Government's Motion to Dismiss the indictment as to the Petitioner-Appellant herein. Upon a timely appeal taken by the Petitioner-Appellant herein to the United States Court of Appeals for the Fifth Circuit, that Honorable Court ruled that where a responsible official within the United States Department of Justice had authorized a Federal prosecution with the full knowledge that such a prosecution was forbidden by the Department's Petite Policy that precludes a Federal prosecution on essentially the same charges that were the subject of a prior State prosecution, such conduct constituted bad faith, and the Government's subsequent Motion to Dismiss the Federal conviction was made with unclean hands and was properly denied despite this Petitioner's contention that such result was both unfair and was in violation of the underlying principal of Federal Rule of Criminal Procedure 48A, which was intended to protect the public interest in the fair administration of criminal justice. Specific attention is directed by the undersigned counsel to the case of Douglas Watts vs. The United States, decided by this Honorable Court on June 23, 1975.

In the Watts decision, supra, the Petitioner was acquitted in the Superior Court of Fulton County, Georgia, of aggravated assault with intent to rob and carrying a concealed weapon. Thereafter, Petitioner was convicted in Federal Court of knowingly possessing an unregistered firearm,

a sawed off shotgun, in violation of 26 U.S.C. 5861(d). The Federal charge arose out of the same episode, and involved the same weapon, as the State prosecution. The Court of Appeals affirmed the Judgment of Conviction rejecting inter alia, Petitioner's contention that the State acquittal barred his Federal prosecution under the double jeopardy clause of the Fifth Amendment.

The evidence at Petitioner's Federal Trial established that in connection with a robbery attempt on November 14, 1973, Petitioner, accompanied by another, assaulted a third party with a 12 gauge single barreled sawed-off shotgun. The alleged victim managed to break away from his assailants and immediately reported the incident to a police officer, an Atlanta policeman who was nearby. The police officer located the Petitioner and a companion a few blocks away and, on the basis of the victim's description, took them into custody. As Petitioner's companion was entering the patrol car, the police officer noticed him bend down "as if he was putting something under the car". Subsequent investigation revealed the sawed off shotgun, which was not registered to the Petitioner under the patrol car.

In rejecting that Petitioner's double jeopardy claim, the Court of Appeals pointed out that under Georgia Code Section 26-9911(a), 9913(a), possession of a sawed off shotgun 15" or less in length, was prohibited, whereas the shotgun involved in the Watts decision had an overall length of 16 1/2". The Court of Appeals held that, in any event, the prior State prosecution and acquittal of Douglas Watts was not a bar to the subsequent Federal prosecution under Abbate vs. United States, 359 U.S. 187 (1959), and Bartkus vs. Illinois, 359 U.S. 121 (1959). Although he agreed with the latter conclusion, the Solicitor General of the United States nevertheless requested the Court to vacate the Judgment of the Court of Appeals and remand the case to the District Court to permit the Government to move for

LAW OFFICES MARK R. BAER, SUITE 400, ROBERTS BUILDING, 28 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TEL. 377-1603

dismissal of the charges against that Petitioner. The request was based on the Government's claim that the prosecution of Douglas Watts under Section 5861 (d),"did not conform to the Department of Justice policy of not prosecuting individuals previously tried in the State court for offenses involving the same acts, unless there exists 'most compelling reasons' and then only after the specific approval of the appropriate Assistant Attorney General has been obtained."

In support of this position, the Solicitor General of the United States stated that no approval had been sought in that case, and he concluded that it "does not present circumstances which constitute compelling reasons for the Federal prosecution." The Solicitor General of the United States additionally noted that the State did not indict the petitioner for possession of a sawed off shot gun, but for carrying a concealed weapon, as to which the length of the shotgun was irrelevant, and he speculated that , since there was ample evidence of concealment, the State jury likely acquitted the petitioner because of insufficient evidence of possession. In light of the fact that possession is an element of the Federal offense proscribed by Section 5861(d), the Solicitor General of the United States had reasoned before this Honorable Court that the policies underlying the Department of Justice's Internal Directive "are directly involved".

This Honorable Court in the Watts decision, supra, held that upon the representation of the Solicitor General of the United States as set forth in his brief for the United States, the Judgment of Conviction against Douglas Watts was vacated and the case was remanded to the United States District Court for the Northern District of Georgia in order to allow the Government to dismiss the charges against the petitioner.

The exact same factual situation occurred in the case sub judice relative to the Petitioner-Appellant herein, PETER RINALDI, as in the Watts

decision, supra, and based upon the Government's own admission of its total non-compliance with its own internal policy relative to multiple prosecutions, it is respectfully submitted that the trial court erred when it denied the Government's Motion for Dismissal of the Indictment as to the Petitioner-Appellant herein, PETER RINALDI.

Additionally, the decision of the United States Court of Appeals for the Fifth Circuit as well as the United States District Court for the Southern District of Florida denial of the Government's Motion to Dismiss the Indictment as to this Petitioner is in violation of the Doctrine of Separation of Powers as embodied within the Federal Constitution.

Additionally, as stated in the decision in United States vs. Ammidown, 497 F.2d 615 (D.C.Cir.1973):

> "We start with the presumption that the determination of the United States Attorney is to be followed in the overwelming number of cases. He alone is in a position to evaluate the government's prosecution resources and the number of cases it is able to prosecute.
>
> First, the trial judge must provide a reasoned exercise of discretion in order to justify departure from the course agreed upon by the prosecution and defense this is not a matter of absolute judicial prerogative. The authority has been granted to the judge to assure protection of the public interest, and this in turn involves one or more of the following components (a) fairness to the defense, such as protection against harrassments; (b) fairness to the prosecution interest, as in avoiding a disposition that does not serve due and legitimate prosecutorial interests; (c) protection of the sentencing authority reserved to the judge. The judge's statement or opinion must identify the particular interest that leaves him to require an unwilling defendant and prosecution to go to trial."

As stated in the Ammidown decision, supra, the question is not what the judge would do if he were the prosecuting attorney, but rather whether he can say that the action of the prosecuting attorney is such a departure from sound prosecutorial principal as to mark it an abuse of prosecutorial discretion.

No where in the District Court's Order denying the United State's Government's Motion for the Dismissal of the Indictment as to the Petitioner-Appellant herein, does the trial court state that the United States Department of Justice or the United States Attorney's office departed from sound prosecutorial principals so as to mark it an abuse of prosecutorial discretion.

QUESTION PRESENTED

Whether or not the opinion of the United States Court of Appeals for the Fifth Circuit, as well as the denial by the United States District Court for the Southern District of Florida of the Government's Motion to Dismiss the Indictment as to the Petitioner-Appellant herein misconceives the applicable law and facts with respect to the power of the United States District Court Judge to deny a Motion made by the United States Deparment of Justice to dismiss an indictment under Federal Rule of Criminal Procedure 48A, and whether or not the opinion of the United States Court of Appeals for the Fifth Circuit misconceives the applicable facts and law with regard to what constitutes a justifiable resistence to a Petite Motion for Dismissal.

STATUTE INVOLVED

NONE

STATEMENT

The Petitioner-Appellant herein, PETER RINALDI, was duly convicted in Miami, Dade County, Florida, in a trial by jury of conspiracy to commit a felony, to wit: armed robbery, and he subsequently received a six year sentence in State Court. Subsequent to said conviction, said Petitioner-Appellant herein was indicted in the Federal Court of a Hobbs Act violation as well as a conspiracy to take and obtain personal property from safety deposit boxes in violation of the laws of the United States. The United States District Court for the Southern District of Florida sentenced the Petitioner-Appellant herein to an additional 12 years imprisonment. After an appeal was timely taken by this Petitioner-Appellant's prior attorney, from the Judgment and Conviction of the United States District Court for the Southern District of Florida, the Respondent herein, THE UNITED STATES OF AMERICA, filed a Motion in the United States Court of Appeals for the Fifth Circuit to remand the case at bar back down to the United States District Court for the Southern District of Florida in order to allow said Respondent to move for a dismissal of the indictment as to this Petitioner. The Honorable Trial Court Judge, James Lawrence King, timely denied the Motion to Dismiss.

The policy upon which the Respondent, THE UNITED STATES OF AMERICA, based its Motion for Dismissal was set forth in a press release issued by then Attorney General William P. Rogers on April 6, 1959. The policy can be summarized by quoting the following language in the press release:

> "No Federal case should be tried when there has already been a State prosecution for substantially the same act or acts without a United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation shall be approved by the Assistant Attorney General in charge of the division without having it first brought to my attention."

It is from the denial of the United States District Court for the Southern District of Florida of the aforementioned Motion by the United States Government to dismiss the indictment as to the Petitioner-Appellant herein that a timely appeal was taken to the United States Court of Appeals for the Fifth Circuit.

After oral argument before the United States Court of Appeals for the Fifth Circuit by the undersigned counsel for the Petitioner-Appellant herein, the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming the decision of the United States District Court Judge in refusing to dismiss the indictment. Said decision was rendered on May 24, 1976 (a copy of said opinion is attached hereto and marked as Petitioner's Exhibit "C")*. A Petition for Rehearing was timely filed by the undersigned counsel as well as a supplemental brief in support of said Petition for Rehearing en banc, and the undersigned counsel respectfully submitted that the decision of the United States District Court for the Southern District of Florida as well as the United States Court of Appeals for the Fifth Circuit was in conflict with the decisions in Ackerson vs. United States, 419 U.S. 1099, 95 S. Ct. 769 (1975); and the decision in United States vs. Hayles, which is reported at 419 U.S. 892, 95 S.Ct. 168 (1974).

In the case of United States vs. Hayles, supra, the defendant was convicted of bank robbery in the United States District Court for the Southern District of Texas. On his appeal to the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the Fifth Circuit stated that:

> "Neither can we review the discretion of the executive in deciding to prosecute for a Federal offense although a State conviction had already been secured for the same conduct."

* Not filmed

This Honorable Court reversed the decision of the United States Court of Appeals for the Fifth Circuit and remanded the decision in Hayles, supra, in order to allow the Government to dismiss the indictment. Therefore, in the instant case, this Honorable Court is presented with facts similar to those presented in the foregoing decisions of the United States Supreme Court.

Once again, it must be noted that this Petitioner had already received a substantial sentence in the State Court for his alleged role in the conspiracy and again received a maximum sentence in the United States District Court in and for the Southern District of Florida, to wit: 12 years. Certainly no compelling circumstances exist which would have required the Government to proceed to prosecute this Petitioner despite their own admissions as to its total non-compliance with their Petite Policy. A copy of the Opinion of the United States Court of Appeals for the Fifth Circuit decided on December 20, 1976, is attached hereto as Petitioner's Exhibit "D"*. Copies of all briefs and Petitions for Rehearing submitted to the United States Court of Appeals for the Fifth Circuit in support of this Petitioner's position are attached hereto as Petitioner's Exhibit "E".

The undersigned counsel suggests that this Honorable Court accept the position of this Petitioner. The traditional doctrine of Separation of Powers mandates that the Executive Branch of this Government have the primary responsibility in determining whether to initiate and terminate a given prosecution. The action taken by the United States Court of Appeals for the Fifth Circuit is contrary to the established case law as hereinabove cited and common sense dictates the fact that when the very branch of the Government which has the power to both initiate and terminate prosecution readily admits that they violated their own internal policies relative to the Federal prosecution of this Petitioner, and assuming arguendo, that the Federal prosecution of this Petitioner was initiated in bad faith, no Court

* Not filmed.

should acquiesce in a bad faith prosecution if any individual was clothed with the protections guaranteed by the United States Constitution.

IN CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Mark R. Baer

MARK R. BAER
Attorney for Petitioner-Appellant
Peter Rinaldi
Suite 400, Roberts Building
28 West Flagler Street
Miami, Florida 33130
Telephone (305) 377-1603

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to the Solicitor General of the United States, c/o The United States Department of Justice, Room 5614, Washington D. C. 20530, this 11th day of February, 1977.

Mark R. Baer
MARK R. BAER

PETITIONER'S EXHIBITS

U. S. COURT OF APPEALS
FILED
JAN 19 1977
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-1773

IN RE:

ISSAC WASHINGTON and
PETER RINALDI,

Defendants-Appellants.

- - - - -

Appeal from the United States District Court for the
Southern District of Florida

- - - - -

ON PETITION FOR REHEARING

(JANUARY 19 , 1977)

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Peter Rinaldi in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

EXHIBIT "A"

United States Circuit Judge

*Due to illness WISDOM and THORNBERRY, Circuit Judges, did not participate in this decision.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-1773

76-6194

ISAAC WASHINGTON, PETER RINALDI,
and PASQUALE SOLE,

Appellant's,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF OF APPELLANT

MARK R. BAER
Attorney for Appellant-Peter Rinaldi
Penthouse #2 - Roberts Building
28 West Flagler Street
Miami, Florida 33130

EXHIBIT "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-1773

ISAAC WHASHINGTON, PETER RINALDI,
and PASQUALE SOLE,

Appellant's,

versus

UNITED STATES OF AMERICA,

Appellee.

LOCAL RULE 13 (a) CERTIFICATE

The undersigned counsel of record for PETER RINALDI certifies that the following listed parties have an interest in the outcome of this case; these representations are made in order that Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13 (a):

PETER RINALDI
Defendant- Appellant
ISAAC WASHINGTON
PASQUALE SOLE
Co-defendants

Mark R. Baer

MARK R. BAER
Attorney of Record for
PETER RINALDI

TOPICAL INDEX

	Page
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	4
POINT INVOLVED ON APPEAL	16
POINT ONE	16
CONCLUSION	17
CERTIFICATE OF SERVICE	17

TABLE OF CITATIONS

Case	Page
Abbate v. United States, 359 U.S. 187 (1959)	13
Bartkus v. Illinois, 359 U.S. 121 (1959)	13
Consolo v. FMC, 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)	5
Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 69 S. Ct. 550, 93 L. Ed. 632 (1949)	4
Douglas Watts v. United States, 43 U.S. L.W. 3672, (1975).	12 - 15
FCC v. WOKO, Inc., 329 U.S. 223, 67 S. Ct. 213, 91 L. Ed. 204 (1946)	5
General Telephone Co. of the Southwest et al. v. United States of America and Federal Communications Commission, 449 F. 2d 846 (5th Cir. 1971)	4
Marakar v. United States, 370 U.S. 723, 82 S. Ct. 1573, 8 L. Ed. 2d 803 (1967).	7
Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1933).	4
Orlando v. United States, 387 F. 2d 348 (9th Cir. 1967)	5 - 6

TABLE OF CITATIONS (cont.)

Case	Page
Petite v. United States, 361 U.S. 529 (1960)	5 - 7
United States v. Ammidown, 497 F. 2d 615 (D.C. Cir. 1973)	5 - 10
United States v. Bettinger Corp., 54 F.R.D. 40, (S.D.N.Y. 1964)	5
United States v. Birrell, 242 F. Supp. 191, 205 (S.D.N.Y. 1965)	4
United States v. Doe, 101 F. Supp. 609 (D. Conn. 1951)	5 - 6 - 8
United States v. Fleming, 215 A. 2d 839 (D.C. App. 1966)	10
United States v. Hedges, 458 F. 2d 188 (10th Cir. 1972)	4
United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n., 228 F. Supp. 483 at 486 (S.D. N.Y. 1964)	5 - 6 - 8

UNITED STATES CONSTITUTION

Amendment V	13

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-1773

ISAAC WASHINGTON, PETER RINALDI,
and PASQUALE SOLE,

Appellant's,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This brief of the Appellant - PETER RINALDI is written in response to the Order of the United States District Court for the Southern District of Florida (the Honorable James Lawrence King presiding) denying the motion of the United States to dismiss the indictment of the Appellant - Peter Rinaldi pursuant to Federal Rules of Criminal Procedure 48 (a).

The case was remanded by the Fifth Circuit Court of Appeals upon the Department of Justice' representation that the Department had failed to comply with its own internal guidelines for initiating a federal prosecution following a State prosecution predicated on the same facts. Although the Department of Justice sought the remand "in order to dismiss the indictment as to those defendants (Sole, Rinaldi and Washington)," the order entered by the Fifth Circuit did not direct the United States District Court to dismiss the indictment. Since Rule 48 (a) allows a dismissal only "by leave of Court", the issue is whether the indictment against these three (3) defendants should have been dismissed according to the trial Court below.

The policy on which the United States Government bases its motion for dismissal was set forth in a press release issued by then Attorney General William P. Rogers, on April 6, 1959. The policy can be summarized by quoting the following language in the press release:

> (N)o federal case should be tried when there has already been a State prosecution for substantially the same act or acts without a United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

It is from this denial by the United States District Court for the Southern District of Florida of the aforementioned motion by the United

States Government to dismiss the indictments of the Appellant - Peter Rinaldi that the Appellant's brief is written.

STATEMENT OF THE FACTS

At the outset, it must be stated that the dismissal of an indictment is discretionary with the trial court. United States v. Hedges, 458 F. 2d 188 (10th Cir. 1972). See also, United States v. Birrell, 242 F. Supp. 191, 205 (S.D.N.Y. 1965).

In General Telephone Company of the Southwest et al, v. United States of America and Federal Communications Commission, 449 F. 2d 846, (5th Cir. 1971), the Fifth Circuit Court of Appeals stated as a general priciple of constitutional law that it is not for the Court to decide the wisdom of an agency's policies. Further, this Honorable Court stated...

> The issue here is whether the rules comport with the requirements of substantive due process. It is, of course, clear that the courts are without power to substitute their judgment for that of the legislative (or administrative) body whose responsibility it is, in the first instance, to decide policy questions. The wisdom or expedtency of a given law or regulation is not open to question in the Courts. Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1933); Daniel v. Family Security Life Insurance Co., 336 U.S. 220, 69 S. Ct. 550, 93 L. Ed. 632 (1949). The judicial function is at an end once it has determined that the regulation in issue is reasonable and not arbitrary. Id. at 859.

It is an established rule that the judiciary must give deference to the choice of remedy selected by the agency unless it reflects an abuse

of discretion so gross as to be arbitrary. Consolo v. F M C, 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131, (1966); FCC v. WOKO, Inc., 329 U.S. 223, 67 S. Ct. 213, 91 L. Ed. 204 (1946).

In the case sub judice, the Honorable James Lawrence King of the United States District Court for the Southern District of Florida in his 'Order Denying Motion for Dismissal' (Case No. 73-696 - Cr - JLK) stated that ...

> "Only a few cases have addressed the peculiar problem presented when the Government seeks a dismissal of an indictment after a conviction has been obtained ..." * * *

The Honorable Trial Court below cited several cases dealing with the judicial scrutiny of a post-trial motion pursuant to Federal Rules of Criminal Procedure 48 (a) dealing with the dismissal of a criminal indictment. See Petite v. United States, 361 U.S. 529 (1960); Orlando v. United States, 387 F. 2d 348 (9th Cir. 1967); United States v. Ammidown, 497 F. 2d 615 (D.C. Cir. 1973); United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n., 228 F. Supp. 483 (S.D. N.Y. 1964); United States v. Bettinger Corp., 54 F.R.D. 40 (D. Mass. 1971) and United States v. Doe, 101 F. Supp. 609, (D. Conn. 1951).

In United States v. Bettinger Corporation, 54 F.R.D. 40 (D. Mass. 1971), the Court, with reference to the provisions of Rule 48

(a) of the Federal Rules of Criminal Procedure, stated:

> "There are a limited number of decisions on the subject. In United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483 at 486 (S.D. N.Y. 1964), Judge Weinfeld stated:
> ". . . to gain the Court's favorable discretion, it should be satisfied that the reasons advanced for the proposed dismissal are substantial and the real grounds upon which the application is based. Such applications should be granted where it appears
> (1) that the Government is without sufficient evidence to warrant prosecution and sustain a conviction, and
> (2) the dismissal is not for the purpose of subjecting a defendant to harassment by the commencement of another prosecution. . . "
> A similar ruling was made in United States v. Doe, 101 F. Supp. 609 at 611 (D. Conn. 1951), where the Court ruled:
> ". . . at least in the absence of very exceptional circumstances as for instance where the defendant has received a substantial sentence for another phase of the same offense, the court may not properly approve a dismissal of the entire case against any given defendant unless satisfied that the government lacks sufficient evidence to warrant a prosecution. Especially is this so where the matter is before the court on indictment as distinguished from information."

570 Law

Orlando v. United States, 387 F. 2d 348 (9th Cir. 1967) involved a proceeding on Motion by the Government, after the affirmance of the defendant's conviction for being an accessary after the fact in connection with a bank robbery, to vacate the judgement of conviction and to remand the cause with directions to dismiss the indictment.

The Ninth Circuit Court of Appeals held that the defendants' conviction would be vacated and the case remanded with the appropriate directions to dismiss Orlandos' indictment. This was on the ground that the original institution of prosecution that resulted in his conviction was contrary to the policy that several offenses arising out of a single transaction should be alleged and tried together and simply should not be the basis for multiple prosecutions.

The Honorable Trial Court below distinguishes the Orlando decision, supra, from the facts of the case at bar upon the ground that in the Orlando decision, the defendant had abandoned his petition for certiorari upon the reliance of the Government's motion for a dismissal pursuant to Rule 48 (a) of the Federal Rules of Criminal Procedure. The Trial Court below emphasized not the majority opinion in the Orlando decision but the dissenting opinion by Judge Pope. It is not the dissent which is controlling but rather it is the majority opinion by the Ninth Circuit Court of Appeals which carries the controlling precidential value.

The Department of Justices' policy of not permitting multiple prosecutions for several offenses arising out of a single transaction were the basis for comparable motions which were granted by the Supreme Court in Petite v. United States, 361 U.S. 529, 80 S. Ct. 450, 4 L. Ed. 2d 490 (1960), and in Marakar v. United States, 370 U.S. 723, 82 S.Ct.

1573, 8 L. Ed. 2d 803 (1962).

The Appellant - Peter Rinaldi had already received a substantial sentence in the State criminal court in Miami, Dade County, Florida and therefore, would fall into the 'exceptional circumstance' doctrine as enunciated in the decision of United States v. Doe, 101 F. Supp. 609 at 611 (D. Conn. 1951), where the Court ruled:

> ". . .at least in the absence of very exceptional circumstances as for instance where the defendant has received a substantial sentence for another phase of the same offense, the court may not properly approve a dismissal of the entire case against any given defendant unless satisfied that the government lacks sufficient evidence to warrant a prosecution. Especially is this so where the matter is before the court on indictment as distinguished from information."

The policy of the United States Department of Justice is not and should not be subject to review by judicial officials (as in the case at bar) unless and until the validity of such policies comes into issue in judicial proceedings. See United States v. Doe, supra, at 612.

In United States v. Greater Blouse, Skirt & Neckwear Contractors Association, 228 F. Supp, 483 (S.D.N.Y. 1964), the Court stated:

> "The Attorney General of the United States, as its chief legal officer, has the authority and the duty to exercise control and supervision of all criminal proceedings and civil cuits to which the United States is a party. He is specifically charged with the enforcement of the antitrust laws both by way of criminal

prosecution and civil sanctions. Accordingly, his judgment, or more correctly, that of the members of his staff who are in immediate charge of the matter, that a prosecution should be abandoned on the ground that the available evidence is insufficient to make out a prima facie case against one defendant, and requires a shift in theory from that presented to the grand jury as to the other defendants as to whom there is a further question of the sufficiency of the evidence to establish the charges beyond a reasonable doubt, is entitled to great weight. His recommendation gains added force, aided as it is by the presumption that he is acting in good faith and in the proper discharge of his duties, but it is not conclusive upon the Court; otherwise there would be no purpose to Rule 48 (a), which requires leave of Court to enter the dismissal. However, to overcome the force of his recommendation, it must clearly and convincingly appear that the public interest requires its refusal.

In the Greater Blouse decision, supra, the Court stated:

"The responsibility for prosecution is upon those in charge of the matter. It is they who must carry on with the witnesses or evidence now available, and if in their considered judgment they are without means successfully to present and adequate case within the framework of the indictment, there is no warrant for continuing the prosecution unless it appears that the assigned reason for the proposed dismissal is not grounded in fact, and none appear. The Court is satisfied that the application is made in good faith and for the reasons stated. It would be an exercise in futility to require the prosecution to go forward with a case in which it has no faith.

Finally, another factor cannot be ignored. Should the motion be denied, what next? The Attorney General is the head of the Department of Justice, a part of the Executive branch of the Government. Even were leave of Court to the dismissal of the indictment

denied, the Attorney General would still have the right to adhere to the Department's view that the indictment cannot be supported by proof upon a trial of the merits, and accordingly, in the exercise of his discretion, decline to move the case for trial. The Court in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine." Id. at 489.

In the case at bar, the Appellant - Peter Rinaldi received a Six (6) years sentence in State Court and then was sentenced to Twelve (12) years in the United States District Court for Southern District of Florida. Certainly, no public purpose is being served by the denial of the trial court below to dismiss the indictment as to this Appellant. —stop line—

As stated in United States v. Ammidown, 497 F. 2d 615 (D.C. Cir. 1973):

"We start with the presumption that the determination of the United States Attorney is to be followed in the overwhelming number of cases. He alone is in a position to evaluate the governments' prosecution resources and the number of cases it is able to prosecute. See United States v. Fleming, 215 A. 2d 839 (D.C. App. 1966)." Id. at 621.

Continuing on, the Court in the Ammidown decision states:

"First, the trial judge must provide a reasoned exercise of discretion in order to justify a departure from the course agreed on by the prosecution and defense. This is not a matter of absolute judicial

prerogative. The authority has been granted to the judge to assure protection of the public interest, and this in turn involves one or more of the following components: (a) fairness to the defense, such as protection against harassment; (b) Fairness to the prosecution interest, as in avoiding a disposition that does not serve due and legitimate prosecutorial interests; (c) protection of the sentencing authority reserved to the judge. The judge's statement or opinion must identify the particular interest that leads him to require an unwilling defendant and prosecution to go to trial.

We now turn to the content of these components, and begin by passing any discussion of fairness to the defense, since it is not directly involved in the case at bar and it has already been identified in the precedents referred to earlier in this opinion. As to fairness to the prosecution interest, here we have a matter in which the primary responsibility obviously, is that of the prosecuting attorney. The District Court cannot disapprove of his action on the ground of incompatibility with prosecutive responsibility unless the judge is in effect ruling that the prosecutor has abused his discretion. The requirement of judicial approval entitles the judge to obtain and evaluate the prosecutor's reasons. That much, indeed, was proposed by the Advisory Committee, and the Supreme Court's amendment obviously did not curtail the proposed authority of the judge. The judge may withhold approval if he finds that the prosecutor has failed to give consideration to factors that must be given consideration in the public interest, factors such as the deterrent aspects of the criminal law. However, trial judges are not free to withhold approval of guilty pleas on this basis merely because their conception of the public interest differs from that of the prosecuting attorney. The question is not what the judge would do if he were the prosecuting attorney, but whether he can say that the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion." Id. at 622.

As stated in the Ammidown decision, supra, the question is not what the judge would do if he were the prosecuting attorney, but rather whether he can say that the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion.

Nowhere in the District Courts' order denying the United States Governments' motion for the dismissal of the indictment as to this Appellant - Peter Rinaldi, does the trial court state that the United States Department of Justice or the United States Attorneys' Office departed from sound prosecutorial principles so as to mark it an abuse of prosecutorial discretion.

Lastly, specific attention is directed by this writer to the case of Douglas Watts v. United States, 43 U.S.L. W. 3672, decided by the Supreme Court of the United States on June 23rd, 1975.

In the Watts decision, supra, the petitioner was acquitted in the Superior Court of Fulton County, Georgia, of aggravated assault with intent to rob and carrying a concealed weapon. Thereafter, petitioner was convicted in federal court of knowingly possessing an unregistered firearm, a sawed-off shotgun, in violation of 26 U.S.C. Sec. 5861 (d). The federal charge arose out of the same episode, and involved the same weapon, as the state prosecution. The Court of Appeals affirmed the judgment of conviction, rejecting, interalia, petitioner's contention that

the state acquittal barred his federal prosecution under the Double Jeopardy Clause of the Fifth Amendment.

The evidence at petitioner's federal trial established that in connection with a robbery attempt on November 14, 1973, petitioner, accompanied by another, assaulted Robert McGibbon with a 12 gauge, single barreled, sawed-off shotgun. McGibbon managed to break away from his assailants and immediately reported the incident to Officer Ward, and Atlanta policeman who was nearby. Ward located petitioner and a companion a few blocks away and, on the basis of McGibbon's description, took them into custody. As petitioner's companion was entering the patrol car, Ward noticed him bend down "as if he was putting something under the car." Subsequent investigation revealed the sawed-off shotgun, which was not registered to petitioner, under the patrol car.

In rejecting petitioner's double jeopardy claim, the Court of Appeals pointed out that under Ga. Code Ann. Secs. 26-9911a, 9913a, possession of a sawed-off shotgun 15 inches or less in length is prohibited, whereas the shotgun involved here had an overall length of 16 1/2 inches. The Court of Appeals held that, in any event, the prior state prosecution and acquittal were not a bar to the subsequent federal prosecution under Abbate v. United States, 359 U.S. 187 (1959), and Bartkus v. Illinois, 359 U.S. 121 (1959). Although he agreed with the latter conclusion, the

Solicitor General nevertheless requested the Court to vacate the judgment of the Court of Appeals and remand the case to the District Court to permit the Government to move for dismissal of the charges against petitioner. The request is based on the Government's claim that the prosecution of petitioner under Sec. 5861 (d) "did not conform to the Department of Justice policy of not prosecuting individuals previously tried in a state court for offenses involving the same acts, unless there exist 'most compelling reasons,' and then only after the specific approval of the appropriate Assistant Attorney General has been obtained."

In support of his position, the Solicitor General stated that no approval had been sought in this case, and he concluded that it "does not present circumstances which constitute 'compelling reasons' for the federal prosecution." He noted that the State did not indict petitioner for possession of a sawed-off shotgun, but for carrying a concealed weapon, as to which the length of the shotgun was irrelevant, and he speculated that, since there was ample evidence of concealment, the state jury likely acquitted petitioner because of insufficient evidence of possession. In light of the fact that possession is an element of the federal offense proscribed by Sec. 5861 (d), the Solicitor General reasoned that the policies underlying the department's internal directive " are directly involved."

The Supreme Court of the United States held in the Watts decision, supra, that upon the representation of the Solicitor General as set

forth in his brief for the United States, the judgment of conviction against Douglas Watts was vacated and the case was remanded to the United States District Court for the Northern District of Georgia in order to allow the Government to dismiss the charges against the petitioner.

The exact same factual situation occurred in the case sub judice relative to the Appellant - Peter Rinaldi as in the Watts decision, supra, and based upon the Government's own admission of its' total non-compliance with its' own internal policy relative to multiple prosecutions it is respectfully suggested that the Trial Court erred when it denied the Governments' Motion for dismissal of the indictment as to the Appellant - Peter Rinaldi.

POINT INVOLVED ON APPEAL

POINT ONE

WHETHER OR NOT THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ERRED WHEN IT DENIED THE GOVERNMENT'S MOTION FOR A DISMISSAL OF THE INDICTMENT AS TO THE APPELLANT - PETER RINALDI.

POINT ONE

THAT THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ERRED WHEN IT DENIED THE GOVERNMENT'S MOTION FOR A DISMISSAL OF THE INDICTMENT AS TO THE APPELLANT - PETER RINALDI.

CONCLUSION

WHEREFORE, the Appellant - Peter Rinaldi prays that this Honorable Court vacate the judgement of conviction rendered against him and remand his case to the United States District Court for the Southern District of Florida in order to allow the Government to dismiss the charges against this Appellant.

Respectfully submitted,

MARK R. BAER
Attorney for Appellant - Peter Rinaldi
Penthouse #2 - Roberts Building
28 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing Appellant's Brief was mailed to the Office of the Department of Justice, to TERRANCE M. BROWN, Appellate Section, Washington, D.C. 20530, this 4th day of September, 1975.

MARK R. BAER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-1773

ISAAC WASHINGTON &
PETER RINALDI

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

MARK R. BAER
Attorney for Appellant - Peter Rinaldi
Suite 400, Roberts Building
28 West Flagler Street
Miami, Florida 33130

EXHIBIT "E"

TABLE OF CONTENTS

	PAGE
Points involved on Appeal	1 - 3
Conclusion	3
Certificate of Service	4

TABLE OF CITATIONS

Cases	Page
Ackerson vs. United States 419 U.S. 1099, 95 S.Ct. 769 (1975)	2
Hayles vs. United States 419 U.S. 892, 95 S.Ct. 168 (1974)	2
Watts vs. United States 95 S.Ct. 2648	1

POINTS INVOLVED ON APPEAL

For the purpose of this Supplemental Brief in regards to this Re-hearing en banc, this Appellant re-adopts and re-avers all of his points raised in his prior Brief dated September 29, 1975.

Additionally, it is the position of this Appellant that this Honorable Court should rely on the decision of the Supreme Court of the United States in Watts vs. United States, 95 S.Ct. 2648, decided on June 23, 1975. The Watts decision, supra, involved an appeal from the State of Georgia to this Honorable Court, after the petitioner had been convicted in the Federal Court of knowingly possessing an unregistered firearm, a sawed-off shotgun, in violation of 26 U.S.C., Section 5861(d). The federal charge arose out of the same episode, and involved the same weapon, as the state prosecution. This Honorable Court affirmed Watts' conviction and the petitioner filed a writ of certiorari to the Supreme Court of the United States. The Supreme Court of the United States remanded the case to the District Court in Georgia in order to permit the government to dismiss its indictment pursuant to the applicable Federal Rules of Criminal Procedure. It is to be noted that the Supreme Court of the United States took the exact same action in similar cases decided prior to

the Watts decision. See also, Hayles vs. United States, 419 U.S. 892, 95 S.Ct. 168 (1974); Ackerson vs. United States, 419 U.S. 1099, 95 S.Ct. 769 (1975).

Additionally, this case differs from the Ackerson decision supra, in that Ackerson failed to raise the alleged Justice Department violation in his record on appeal, and therefore, the Eighth Circuit Court of Appeal would not express an opinion on this issue.

In the case of United States vs. Hayles, supra, the defendant was convicted of bank robbery in the United States District Court for the Southern District of Texas. On his appeal to this Honorable Court, this Court stated that:

> "Neither can we review the discretion of the Executive in deciding to prosecute for a federal offense although a state conviction had already been secured for the same conduct."

As already stated, the Supreme Court of the United States reversed this Honorable Court's decision and remanded that case in order to allow the government to dismiss the indictment.

Therefore, in the instant case, this Honorable Court is presented with facts similar to those presented in the foregoing United States Supreme Court decisions.

Once again, it should be noted that this Appellant received a substantial sentence in the United States District Court in and for the Southern District of Florida, to wit: Twelve (12) years

to run concurrently with his State sentence, said conviction being predicated upon the same set of facts.

CONCLUSION

WHEREFORE, for the foregoing reasons as stated in this Supplemental Brief as well as the points raised in Appellant's Brief which are being re-adopted for the purpose of this Re-hearing en banc, this Appellant respectfully prays that this Honorable Court remand this case to the United States District Court for the Southern District of Florida, in order to allow the government to dismiss the indictment rendered against him, just as the Justice Department dismissed the indictments as to most of the other co-defendants in the trial court below.

Respectfully submitted,

MARK R. BAER
Attorney for Appellant, Peter Rinaldi
Suite 400, Roberts Building
28 West Flagler Street
Miami, Florida 33130

UNITED STATES COURT OF APPEALS
FOR THE
FIFTH JUDICIAL CIRCUIT

NO.: 75-1773

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

versus

PETER RINALDI,

Defendant- Appellant.

PETITION FOR REHEARING

The Appellant, PETER RINALDI, by and through his undersigned counsel, respectfully petitions this Honorable Court for a Rehearing in the above cause. This Petition for Rehearing is filed pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure.

I express a belief, based on a reasoned and studied professional judgement, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: United States vs. Cox, 342 F. 2d 167 (5th Cir. 1965); United States vs. Cowan, 524 F.2d 504 (5th Cir. 1975); and Watts vs. United States, 422 U.S. 1032, 95 S.Ct. 2648, 45 L. Ed. 2d 688 (1975).

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

> " Whether or not the opinion of this Honorable Court as decided on December 20th, 1976 sanctions the actions of a Trial Judge when said Trial Judge evaluates the wisdom of the Executive resolution of a matter and substitutes its' judgement for that of a prosecutor and thereby violates the principles of the Doctrine of Separation of Powers ?"

STATEMENT OF THE ISSUES FOR WHICH A REHEARING IS SOUGHT

1. The opinion of this Court misconceives the applicable law d facts with respect to the power of a United States District Court Judge deny a motion made by the United States Department of Justice, Criminal vision to dismiss an indictment under Federal Rule of Criminal Procedure (a).

2. The opinion of this Court misconceives the applicable facts and w with respect to the Governments misconduct in the case at bar.

3. The opinion of this Court misconceives the applicable facts and w with regard to what constitutes a justifiable resistance to a Petite motion r dismissal.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. The first reason why this Petition for Rehearing should be granted is that e opinion of this Court misconceives the applicable law and facts with respect the power of a United States District Court Judge to deny a motion made by the nited States Department of Justice, Criminal Division to dismiss an indictment nder Federal Rule of Criminal Procedure 48 (a).

At the outset, it must be stated that the dismissal of an indictment is scretionary with the trial court. United States v. Hedges, 458 F. 2d 188 (10th ir. 1972). See also, United States v. Birrell 242 F. Supp. 191, 205 (S.D.N.Y. 965).

In General Telephone Company of the Southwest, et al v. United tates of America and Federal Communications Commission, 449 F. 2d 846, 5th Cir. 1941), this Honorable Court stated as a general principle of constitutional aw that it is not for the Court to decide the wisdom of an agency's polivies. urther, this Honorable Court stated:

> "The issue here is whether the rules comport with the requirements of substantive due process. It is, of course, clear that the courts are without power to substitute their judgment for that of the legislative (or administrative) body whose responsibility it is, in the first instance, to decide policy questions. The wisdom or expediency of a given law or regulation is not open to question in the Courts. Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1933); Daniel v. Family Security Life Insurance Co., 336 U.S. 220, 69 S. Ct. 550, 93 L.Ed. 632 (1949). The judicial function is at an end once it has determined that the regulation in issue is reasonable and not arbitrary. Id. at 859 "

It is an established rule that the judiciary must give deference to the choice of remedy selected by the agency unless it reflects an abuse of discretion so gross as to be arbitrary. Consolo v. F.M.C, 383 U.S. 607, 86 S.Ct. 1018, 16 L. Ed. 2d 131, (1966); FCC v. WOKO, Inc., 329 U.S. 223, 67 S. Ct. 213, 91 L. Ed. 204 (1946).

Cases decided under Rule 48 (a) of the Federal Rules of Criminal Procedure have generally held that the prosecutor must state valid reasons for moving for dismissal of an action pending before the court. See, United States v. Ammidown, 497 F. 2d 615 (D.C.Cir. 1973). The courts have generally indicated that the reasons for dismissal must be grounded in fact, and have required a showing of some factual evidence in support of the stated reason for dismissal before ruling on the motion. United States v. Doe, 101 F. Supp. 609 (D. Conn. 1951).

At the same time, the prosecutor is entitled to a presumption of good faith, and his opinion is given great weight. See, United States v. Greater Blouse, Skirt and Neckwear Contractors Ass'n, 228 F. Supp. 483 (S.D.N.Y. 1964). The trial judge in ruling on the motion is not free to substitute his ~~own~~ judgment for that of the prosecutor. Dismissal must be granted by the court where it does not clearly and convincingly appear that the public interest requires its refusal.

The critical question in the cases decided prior to this Honorable Courts decision in United States v. Cowan, supra, which analyzed the scope of judicial review under Rule 48 (a) is whether the determination by the prosecutor to move for dismissal was such a blatant and extreme departure from sound principle as to render it an abuse of discretion. The trial court should and usually does exercise its judgment in this regard with a degree of restraint reminiscent of that which it might bring to bear in reviewing ano order entrusted in the first instance to the discretion of the regulatory agency which issued it, or that which an appellate court might exercise in reviewing findings discretionary with the court below. National Broadcasting Co. v. FCC, 516 F.2d 1101 (cir.1974) and Delno v. Market St. Ry., 124 F. 2d 965 (9th Cir. 1942).

This Honorable Courts' opinion of December 20th, 1976 is contra to this Honorable Courts opinion in Cowan, supra. United States v. Cowan, states that a prosecutors' decision to terminate a pending indictment should not be

judicially disturbed unless clearly contrary to the manifest public interest. On its surface, this standard mirrors that set out in earlier decisions interpreting the scope of judicial review of Rule 48 (a) motions. Cowan retains the requirement delineated in prior cases that the prosecutor allege facially valid reasons for dismissal, but holds that the basic consideration which prompted the trial court to deny dismissal- that no factual support for the prosecutors' stated reasons for dismissal was forthcoming- was a legally insufficient ground for denying the motion. In other words, it is within the province of the executive branch to weigh the relative importance of separate prosecutions in different districts and dispose of them as practical considerations seem to dictate. Thus, this Honorable Court held in the Cowan decision, supra, that the trial court did not only apply the wrong standard in weighing the evidence favoring dismissal, but rather erred in the first instance by insisting on its production.

/ The thrust of the decision in Cowan, then, is that it must clearly and convincingly appear from the statement of reasons put forward by the prosecutor in favor of dismissal, standing alone, that the public interest requires the prosecution to proceed, if the trial court is to act within the scope of its discretion in denying the motion. The prosecutors' reasons would have to be invalid on their face to merit judicial refusal to dismiss. Where the prosecutor alleges reasons for dismissal which are facially valid, the court is effectively barred from inquiring as to whether or not there has been a reasoned determination.

Aside from facially invalid reasons for dismissal, , prosecutorial discretion in the Rule 48 (a) context may be checked only where exercised in "bad faith." However, there is a heavy presumption of good faith on the part of the prosecutor. When this is intertwined with the bar to judicial inquiry into the factual basis for dismissal, it should be the rare instance in which the executive decision to dismiss will be judicially disturbed.

In the case at bar, the United States Department of Justice stated that the reason for its desire to dismiss the indictment against the Defendant - Appellant herein was a realization that there was a Petite Policy violation. It escapes the reasoning of this Counsel why such a reasons is considered by this Honorable Court to be facially invalid. Certainly, no public interest is being served by the continuation of the subject prosecution, especially in light of the fact that this

Defendant- Appellant has already received the maximum sentence in the State courts. This Honorable Cpurt more closely circumscribed the authority of a trial judge to deny such motions in the Cowan decision, yet, in the case at bar, this Honorable Court has sanctioned the trial judges' active steps to evaluate the wisdom of an Executive resolution regarding the decision to terminate a prosecution, and, in fact, substituted its won judgment for that of the United States Department of Justice. As the Honorable Judge Brown noted in his concurring opinion in United States v. Cox, 342 F.2d 167 (5th Cir. 1965):

> "The Trial Court's role or range of action under Rule 48 (a) is confined to the protection of the rights of the Defendant, Id. at 182, and he pointed out that the en banc court "seems to be in virtual agreement that this rule is for the protection of the defendant alone." Id. at 183, n. 6."

2. The second reason why this Petition for Rehearing should be granted is that the opinion of this Court misconceives the applicable facts and law with respect to the Governments misconduct in the case at bar.

As stated in the dissenting opinion in this case by Circuit Court Judge Tjoflat, a search of the record in this cause from the beginning to the end has failed to turn up anything to justify the original 2 to 1 decision in this case. The facts as stated in the majority decision, 531 F. 2d 1297, are no more than sheer speculation. It must be pointed out as stated by the Honorable Judge Tjoflat, that the Supreme Court of Florida did not deny certiorari until October 3, 1974, see Pompeo v. State, 303 So. 2d 21 (Fla. 1974) and the United States Supreme Court denied Certiorari only on November 4, 1974. The majority decision as well as the en banc decision of this Honorable Court has clearly overlooked the later history of the State Court prosecution. Additionally, one of the five Justices of the Supreme Court of Florida Dissented from the denial of Certiorara. See, 303 So. 2d 21. In view of these facts it becomes quite clear that this Honorable Courts' rationale that the United States Government after April 3, 1974 abandoned any fears that the State conviction might be overturned is simply unsupported by the record in this case. Since this assumption is basic to the majority finding of bad faith on behalf of the United States Government, the undersigned Attorney must clearly reject that finding as well.

3. The third reason why this Petition for Rehearing should be garnted is that the opinion of this Court misconceives the applicable facts and law with regard to what constitutes a justifiable resistance to a Petite motion for dismissal.

As stated in Point II of this Petition for Rehearing, the majority decision in this case is based upon speculation as to what constitutes the real reason that the United Staes Department of Justice sought to adamantly pursue the prosecution of this Defendant. The Government was totally unaware of a violation of the Petite Policy until it was raised in this case on or about August 2, 1974. At this juncture, Government Counsel then investigated this point and once having discovered its own non- compliance with its won policy, he referred the matter to the Assistant Attorney General. This official then decided that, had the proper procedures been followed, he would not have authorized the prosecution. Thereupon, without reference to the status of the State Court proceedings (in which Petitions for Certiorari were still pending) trial counsel moved to dismiss the indictment. It readily appears that the most that one could charge the Government with in this case is simply a grossly negligent failure in not having spotted any earlier the violation of its won internal policy.

WHEREFORE, based on the aforesaid reasons this Defendant- Appellant prays that this Honorable Court grant unto him his Petition for a Rehearing.

SUGGESTION FOR REHEARING "EN BANC".

The Appellant PETER RINALDI, by and through his undersigned Counsel respectfully petitions this Honorable Court for a Rehearing "En Banc." This suggestion for a Rehearing "En Banc" is based upon the fact that the December 20th, 1976 En Banc decision of this Honorable Court was a 7 to 6 decision with two judges not in attendance due to illness. The case at bar was an extremely difficult one to decide and involves serious Constitutional issues dealing with the Separation of Powers Doctrine. Additionally, the Supreme Court of the United States has decided a case called Watts v. United States, 422 U.S. 1032, 95 S. Ct. 2648, 45 L. Ed. 2d 688 (1975) in which that Honorable Court when presented with a factually similar situation regarding a violation of the Potitie Policy has ruled just the opposite of this Honorable Court.

WHEREFORE, the Defendant- Appellant, PETER RINALDI, by and through hid undersigned Counsel respectfully requests that this Honorable Court grant his Petition for a Rehearing "En Banc."

Respectfully submitted,

By:_____

Mark Richard Baer
Suite 400, Roberts Building
28 West Flagler Street
Miami, Fla. 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy fo the foregoing Petition for Rejearing was mailed this 31st day of December, 1976 to Jerome N. Feit, Esquire, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C. 20530.

_____

MARK RICHARD BAER

UNITED STATES COURT OF APPEALS FOR THE

FIFTH JUDICIAL CIRCUIT

NO. 75-1773

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PETER RINALDI,

Defendant-Appellant.

PETITION FOR REHEARING

MARK RICHARD BAER
Attorney for Defendant-Appellant
28 West Flagler
Roberts Building, Suite 450
Miami, Florida 33130

UNITED STATES COURT OF APPEALS
FOR THE
FIFTH JUDICIAL CIRCUIT

NO. 75-1773

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

versus

PETER RINALDI,

Defendant-Appellant.

PETITION FOR REHEARING

The Appellant, PETER RINALDI, by and through his undersigned counsel, respectfully petitions this Honorable Court for a Rehearing in the above cause. This petition for Rehearing is filed pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES FOR WHICH A REHEARING IS SOUGHT

1. The opinion of this Court misconceives the applicable law and facts with respect to the power of a United States District Court Judge to deny a motion made by the United States Department of Justice, Criminal Division to dismiss an indictment under Federal Rule of Criminal Procedure 48(a).

2. The opinion of this Court misconceives the applicable facts and law with respect to the Governments misconduct in the case at bar.

3. The opinion of this Court misconceives the applicable facts and law with regard to what constitutes a justifiable resistance to a Petite motion for dismissal.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. The first reason why this Petition for Rehearing should be granted is that the opinion of this Court misconceives the applicable law and facts with respect to the power of a United States District Court Judge to deny a motion made by the United States Department of Justice, Criminal Division to dismiss an indictment under Federal Rule of Criminal Procedure 48(a).

At the outset, it must be stated that the dismissal of an indictment is discretionary with the trial court. United States v. Hedges, 458 F.2d 188 (10th Cir. 1972). See also, United States v. Birrell, 242 F. Supp. 191, 205 (S.D.N.Y. 1965).

In General Telephone Company of the Southwest et al, v. United States of America and Federal Communications Commission, 449 F. 2d 846, (5th Cir. 1941), the Fifth Circuit Court of Appeals stated as a general principle of constitutional law that it is not for the Court to decide the wisdom of an agency's policies. Further, this Honorable Court stated...

> The issue here is whether the rules comport with the requirements of substantive due process. It is, of course, clear that the courts are without power to substitute their judgment for that of the legislative (or administrative) body whose responsibility it is, in the first instance, to decide policy questions. The wisdom or expediency of a given law or regulation is not open to question in the Courts. Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L.Ed. 940 (1933); Daniel v. Family Security Life Insurance Co., 336 U.S. 220, 69 S.Ct.550, 93 L.Ed. 632 (1949). The judicial function is at an end once it has determined that the regulation in issue is reasonable and not arbitrary. Id. at 859.

It is an established rule that the judiciary must give deference to the choice of remedy selected by the agency unless it reflects an abuse of discretion so gross as to be arbitrary. Consolo v. F M C, 383 U.S. 607, 86 S. Ct. 1018, 16 L.Ed. 2d 131, (1966); FCC v. WOKO, Inc., 329 U.S. 223, 67 S. Ct. 213, 91 L.Ed. 204 (1946).

In the case sub judice, the Honorable James Lawrence King of the United States District Court for the Southern District of Florida in his

'Order Denying Motion for Dismissal' (Case No. 73-696 - Cr-JLK) stated that...

> "Only a few cases have addressed the peculiar problem presented when the Government seeks a dismissal of an indictment after a conviction has been obtained..."

The Honorable Trial Court below cited several cases dealing with the judicial scrutiny of a post-trial motion pursuant to Federal Rules of Criminal Procedure 43(a) dealing with the dismissal of a criminal indictment. See Petite v. United States, 361 U.S. 529 (1960); Orlando v. United States, 387 F. 2d 348 (9th Cir. 1967); United States v. Ammidown, 497 F. 2d 615 (D.C. Cir. 1973); United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n. 228 F. Supp. 483 (S.D.N.Y. 1964); United States v. Bettinger Corp., 54 F.R.D. 40 (D.Mass. 1941) and United States v. Doe, 101 F. Supp. 609, (D. Conn. 1951).

In United States v. Bettinger Corporation, 54 F.R.D. 40 (D.Mass. 1941), the Court, with reference to the provisions of Rule 48(a) of the Federal Rules of Criminal Procedure, stated:

> There are a limited number of decisions on the subject. In United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483 at 486 (S.D.N.Y. 1965), Judge Weinfeld stated:
> "... to gain the Court's favorable discretion, it should be satisfied that the reasons advanced for the proposed dismissal are substantial and the real grounds upon which the application is based. Such applications should be granted where it appears (1) that the Government is without sufficient evidence to warrant prosecution and sustain a conviction, and
> (2) the dismissal is not for the purpose of subjection a defendant to harrassment by the commencement of another prosecution..."
> A similar ruling was made in United States v. Doe, 101 F. Supp. 609 at 611 (D. Conn. 1951), where the Court ruled:
> "...at least in the absence of very exceptional circumstances as for instance where the defendant has received a substantial sentence for another phase of the same offense, the court may not properly approve a dismissal of the entire case against any given defendant unless satisfied that the government lacks sufficient evidence to warrant a prosecution. Especially is this so where the matter is before the court on indictment as distinguished from information."

The Appellant - Peter Rinaldi had already received a substantial

sentence in the State criminal court in Miami, Dade County, Florida and therefore, would fall into the 'exceptional circumstance' doctrine as enunciated in the decision of United States v. Doe, 101 F.Supp. 609 at 611 (D.Conn. 1951), where the Court ruled:

> "... at least in the absence of very exceptional circumstances as for instance where the defendant has received a substantial sentence for another phase of the same offense, the court may not properly approve a dismissal of the entire case against any given defendant unless satisfied that the government lacks sufficient evidence to warrant a prosecution. Especially is this so where the matter is before the court on indictment as distinguished from information."

The policy of the United States Department of Justice is not and should not be subject to review by judicial officials (as in the case at bar) unless and until the validity of such policies comes into issue in judicial proceedings. See United States v. Doe, supra, at 612.

In United States v. Greater Blouse, Skirt & Neckwear Contractors Association, 228 F. Supp, 483 (S.D.N.Y. 1964), the Court stated:

> "The Attorney General of the United States, as its chief legal officer, has the authority and the duty to exercise control and supervision of all criminal proceedings and civil cuits to which the United States is a party. He is specifically charged with the enforcement of the antitrust laws both by way of criminal prosecution and civil sanctions. Accordingly, his judgment , or more correctly, that of the members of his staff who are in immediate charge of the matter, that a prosecution should be abandoned on the ground that the available evidence is insufficient to make out a prima facie case against one defendant, and requires a shift in theory from that presented to the grand jury as to the other defendant as to whom there is a further question of the sufficiency of the evidence to establish the charges beyond a reasonable doubt, is entitled to great weight. His recommendation gains added force, aided as it is by the presumption that he is acting in good faith and in the proper discharge of his duties, but it is not conclusive upon the Court; otherwise there would be no purpose to Rule 48 (a), which requires leave of Court to enter the dismissal. However, to overcome the force of his recommendation, it must clearly and convincingly appear that the public interest requires its refusal.

Important

In the Greater Blouse decision, supra, the Court stated:

> "The responsibility for prosecution is upon those in charge of the matter. It is they who must carry on with

> the witnesses or evidence now available, and if in their considered judgment they are without means successfully to present and adequate case within the framework of the indictment, there is no warrant for continuing the prosecution unless it appears that the assigned reason for the proposed dismissal is not grounded in fact, and none appear. The Court is satisfied that the application is made in good faith and for the reasons stated. It would be an exercise in futility to require the prosecution to go forward with a case in which it has no faith.
>
> ——> finally, another factor cannot be ignored. Should the motion be denied, what next? The Attorney General is the head of the Department of Justice, a part of the Executive branch of the Government. Even were leave of Court to the dismissal of the indictment denied, the Attorney General would still have the right to adhere to the Department's view that the indictment cannot be supported by proof upon a trial of the merits, and accordingly, in the exercise of his discretion, decline to move the case for trial. The Court in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of power doctrine." Id. at 489.

In the case at bar, the Appellant - Peter Rinaldi received a Six (6) years sentence in State Court and then was sentenced to Twelve (12) years in the United States District Court for Southern District of Florida. Certainly, no public purpose is being served by the denial of the trial court below to dismiss the indictment as to this Appellant.

2. The second reason why this Petition for Rehearing should be granted is that the opinion of this Court misconceives the applicable facts and law with respect to the Governments misconduct in the case at bar.

As stated in the dissenting opinion in this case by 5th Circuit Court Judge Tjoflat, a search of the record in this cause from the beginning to end has failed to turn up anything to justify the two to one decision in this case. The facts as stated in the majority decision are no more than sheer speculation. It must be pointed out as stated by the Honorable Judge Tjoflat, that the Supreme Court of Florida did not deny Cetiorari until October 3, 1974, see Pompeo v. State 303 So. 2d 21 (Fla. 1974) and the United States Supreme Court denied Cetiorari only on November 4, 1974. The majority decision in this case has clearly overlooked the later history of the State Court prosecution. Additionally, one of the five Justices of the

Supreme Court of Florida Dissented from the denial of Certiorari. See 303 So. 2d 21. In view of these facts it comes quite clear that this Courts rationale that the United States Government after April 3, 1974 abandoned any fears that the State Conviction might be overturned is simply unsupported by the record in this case. Since this assumption is basic to the majority finding of bad faith in behalf of the United States Government, the undersigned Attorney must clearly reject that finding as well.

The undersigned attorney respectfully adopts the sequence of events as espoused in the Dissenting opinion of the Honorable Circuit Court Judge Tjoflat.

3. The third reason why this Petition for Rehearing should be granted is that the opinion of this Court misconceives the applicable facts and law with regard to what constitutes a justifiable resistance to a Petite motion for dismissal.

As stated in point two of this petition for Rehearing, the majority decision in this case is based upon speculation as to what constitutes the real reason that the United States Department of Justice sought to admitly pursue the prosecution of this defendant. The Government was totally unaware of a violation of the Petite Policy until it was raised in this case on or about August 2, 1974. At this juncture, Government Counsel then investigated this point and once having discovered its own non compliance with his own policy he referred the matter to the Assistant Attorney General. This official then decided that, had the proper proceedures been followed, he would not have authorized the prosecution. Thereupon, without reference to status of the State Court Proceedings (in which petitions for CCetiorari were still pending), trial counsel moved to dismiss the indictment. It readily appears that the most that one could charge the Government with in this case is simply a negligent failure in to having spotted any earlier a violation of its own internal policy.

WHEREFORE, based on the aforesaid reasons the defendant prays

that this Honorable Court grant onto him his petition for rehearing.

SUGGESTION FOR REHEARING 'EN BANC.'

The Appellant PETER RINALDI, by and through his undersigned counsel respectfully petitions this Honorable Court for a Rehearing 'En Banc.' This suggestion for a Rehearing 'En Banc' is based upon the fact that the case at bar was an extremely difficult one to decide and involves serious Constitutional issues dealing with the Separation of Powers Doctrine. Additionally the Supreme Court of the United States has decided a case called Douglas Watts v. United States 422 U.S. 1032, 95 S. Ct. 2648, in which the Honorable Court when presented with a factually similar situation regarding a violation of the Petite policy has ruled just the opposite of this Honorable Court.

WHEREFORE, the Appellant, PETER RINALDI, by and through his undersigned attorney respectfully requests that this Honorable Court grant his petition for Rehearing 'En Banc.'

Respectfully submitted,

MARK RICHARD BAER
Attorney for Defendant-Appellant
Peter Rinaldi
28 West Flagler
Roberts Building, Suite 450
Miami, Florida 33130

by_____
MARK RICHARD BAER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing was mailed this 3rd day of June, 1976 to TERENCE M. BROWN, Attorney, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C. 20530

MARK RICHARD BAER